

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
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Amendment of 47 C.F.R. § 1.1200 )  
et seq. Concerning Ex Parte )  
Presentations in Commission )  
Proceedings )  
)

GC Docket No. 95-21

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AT&T COMMENTS

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## SUMMARY

While AT&T supports the Commission's objective to simplify and clarify its ex parte rules, three of the proposed changes in the rules would not be in the public interest. First, ex parte contacts in Section 208 complaint proceedings should continue to be restricted. Because these proceedings are quasi-adjudicatory, basic tenets of fair play and due process require that the decision be made upon a public record -- which would not be possible under "permit but disclose" rules.

Second, as the Commission found when it last examined the issue, ex parte contacts in tariff proceedings that have not been designated for hearing or investigation should continue to be treated as exempt from disclosure rules. Because the Commission often requires information from the carrier on a daily basis, applying a "permit but disclose" rule would impede free-flowing communications in, and otherwise delay, a tariff review process that the Commission has properly sought to make flexible and expeditious.

Third, summaries of oral ex parte communications should continue to be required to contain only new information that has not previously been presented. Requiring a summary for information already present in the

public record would not provide any benefit to a reviewing court or to interested persons before the Commission, but would create wholly unnecessary additional filing burdens.

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AT&T COMMENTS

Pursuant to Section 1.415 of the Commission's Rules, AT&T Corp. ("AT&T") comments on the Commission's Notice of Proposed Rulemaking (Notice), FCC 95-52, released February 7, 1995, concerning revisions of the Commission's ex parte procedures.

INTRODUCTION

AT&T generally supports the Commission's objective of simplifying and clarifying its ex parte rules. Several of the proposed revisions to those rules, however, would effect fundamental changes that would render the Commission's procedures both substantially less fair and significantly more cumbersome.

For these reasons, AT&T urges the Commission not to adopt three of the proposed rule changes.

Specifically, the Commission should not alter its longstanding practices by (1) permitting ex parte contacts in Section 208 complaint proceedings (47 U.S.C. § 208); (2) subjecting tariff proceedings that have not been designated for hearing or investigation to "permit but disclose" requirements; or (3) requiring summaries of oral ex parte presentations to reiterate arguments and data that have already been placed on the public record.

I. FORMAL COMPLAINT PROCEEDINGS UNDER SECTION 208 SHOULD CONTINUE TO BE TREATED AS RESTRICTED PROCEEDINGS IN WHICH EX PARTE PRESENTATIONS ARE PROHIBITED.

The Commission's rules currently classify formal complaint proceedings brought under Section 208 of the Communications Act as "restricted." Ex parte presentations in such proceedings are therefore prohibited. See 47 C.F.R. § 1.1208(c)(ii)(b). Under the proposed rules, however, ex parte presentations would be permitted in such proceedings except where the Commission holds an on-the-record hearing (and where ex parte contacts would therefore independently be barred under 5 U.S.C. § 557(d)). Because the Commission holds on-the-record hearings in Section 208 complaint proceedings only on the rarest of occasions, this change would mean that ex parte contacts would be allowed in virtually every

adjudicative proceeding before the Commission under Section 208.

This proposed rule should not be adopted. In resolving formal complaints, the Commission acts as an "adjudicator of private rights." AT&T v. FCC, 978 F.2d 727, 732 (D.C. Cir. 1993), cert. denied, 113 S. Ct. 3020 (1993). Complaints alleging violations of the Communications Act may be filed with the Commission or in federal court, see 47 U.S.C. § 207, and if the complainant elects to file at the Commission, the Commission acts as a judge in determining whether the defendant has violated the law and is liable for damages.

Therefore, as the Commission recognizes, in such proceedings its procedures must "comport[] with fundamental principles of fairness" (Notice, ¶ 1) and satisfy "basic tenets of fair play and due process" (id., ¶ 2). Permitting ex parte contacts between the Commission and parties to the proceeding (or interested non-parties), however, would disserve that objective. See Sierra Club v. Costle, 657 F.2d 298, 400 (D.C. Cir. 1981) ("Where agency action resembles judicial action, where it involves . . . adjudication, . . . the insulation of the decisionmaker from ex parte contacts is justified by basic notions of due process to the parties involved") (internal quotations and footnotes omitted); Power Auth. v. FERC,

743 F.2d 93, 110 (2d Cir. 1984) ("Ex parte communications . . . with a judicial or quasi-judicial body regarding a pending matter are improper and should be discouraged").

The Notice suggests (Notice, ¶ 20) that there is no need for such "insulation" provided a summary of the party's ex parte presentation is placed on the public record. The Notice is wrong.

First, summaries are only that -- summaries. Unlike written filings served on all parties, or oral presentations at which both parties are present, summaries by definition will not fully disclose what the party told the agency. For that reason, the Administrative Conference of the United States has concluded that parties "may be unable to reply effectively to information, proposals or arguments presented in an ex parte communication" even when a summary is provided. See Ex Parte Communications in Informal Rulemaking Proceedings, 1 C.F.R. § 305.77-3.<sup>1</sup>

Second, even a complete summary would reveal only one side of the communication. While the rules would

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<sup>1</sup> Notwithstanding that potential unfairness, the Administrative Conference concluded that a "permit but disclose" rule would be appropriate in rulemakings -- but only because in rulemakings "the constraints appropriate for adjudication [i.e., a ban on ex parte contacts] are neither practicable nor desirable." Id.

require the party making the contact to disclose what that party said, they would not require disclosure of the Commissioner or staff member's responses -- such as what questions were asked, or how he or she reacted to the arguments and data presented. Such information about a decisionmaker's attitude and thinking is extremely valuable to a litigant, but the ex parte nature of these contacts ensures that it will be revealed only to the party that is physically present. That is manifestly unfair. As Chief Judge Robinson has explained:

The party permitted to witness an internal discussion during which the legal analysis of the decisionmaker on a key issue is evolving enjoys an obvious advantage even if he cannot discern exactly how the decisionmaker ultimately will vote. Able to observe the questions asked, the concerns expressed, and the suggestions made by the decisionmaker, the party can tailor his subsequent presentations accordingly, and so enhance their effectiveness.

Professional Air Traffic Controllers Organization v. Federal Labor Relations Auth., 685 F.2d 547, 594 (D.C. Cir. 1982) (Robinson, C.J., concurring in part and concurring in the judgment).

Third, parties would not be guaranteed equal opportunity to engage in such contacts. The Notice is explicit in stating (§ 30) that a meeting by a Commissioner or staff member with one party will not create any right in the other party to a similar meeting.

But see Action for Children's Television v. FCC, 564 F.2d 458, 477 (D.C. Cir. 1977) (ex parte contact in rulemaking was permissible in part because there was "no indication that [Commission chairman] 'gave to any interested party advantages not shared by all'" (citation omitted)).<sup>2</sup>

Fourth, ex parte contacts will substantially complicate judicial review. The propriety of particular ex parte contacts will frequently become a basis for an unsuccessful party to challenge the Commission's determination on appeal. Parties will claim that the Commission failed to give each side equal access to decisionmakers, that summaries were not complete, or that other aspects of the ex parte process rendered the decision unfair or prevent the court from having before it a full record for judicial review. Whatever the merits of such claims in individual cases, they will, at a minimum, create uncertainty as to the finality of Commission decisions and increase the burden of defending those decisions when they are appealed.

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<sup>2</sup> In any event, every time a party in a complaint proceeding makes an ex parte contact, the opposing party will feel obliged to respond in some form. If it cannot obtain a similar ex parte meeting, it will at least respond with a new written submission. Thus, one effect of the new rules will be to increase substantially not only the number of requests for ex parte meetings but the number of written filings as well.

Finally, there are no countervailing considerations that would justify the proposed change in the rules. Classifying Section 208 complaint proceedings as restricted would neither disrupt the Commission's goal of "reduc[ing] the complexity" of its rules (Notice, ¶ 9), nor "unduly interfere with legitimate communications between the parties and the staff" (Notice, ¶ 25). The proposed rules already contain exceptions to the permit-but-disclose principle, and prohibiting ex parte contacts in complaint proceedings would simply add one additional, easily defined and well-recognized, exception. And all parties, and interested non-parties, would still be able to participate fully and make their views known to the Commission -- but through written submissions that would be served on other parties or at meetings at which all parties would be present.

II. TARIFF AND OTHER RATEMAKING PROCEEDINGS SHOULD CONTINUE TO BE EXEMPT FROM EX PARTE RULES UNLESS AND UNTIL THEY ARE SET FOR INVESTIGATION OR HEARING.

The Commission has a "longstanding practice of exempting tariff proceedings not set for investigation or hearing from ex parte regulation." In the Matter of Ex Parte Communications and Presentations in Commission Proceedings, 2 FCC Rcd. 3011, 3016 (1987) ("1987 Order"), recon., 2 FCC Rcd. 6053 (1987). The Commission re-

examined that practice as recently as 1987, and concluded that it should be maintained. Id. at 3016-17. One effect of the proposed rules would be to reverse that practice and subject tariff proceedings to a "permit but disclose" rule whenever another party has intervened -- such as when a petition to reject, suspend, or investigate has been filed. The Notice does not specifically defend or justify this change, and instead invites interested parties to address the issue in their comments. Notice, ¶ 29.

The same reasoning that led the Commission in 1987 to continue exempting tariff proceedings from ex parte restrictions remains at least as applicable today. Preliminarily, tariff proceedings "are radically different from adjudicative proceedings and other types of rule making proceedings." 1987 Order, 2 FCC Rcd. at 3017. The Commission is not required to provide a statement of reasons for its discretionary decision not to reject or suspend a tariff. That decision does not constitute a determination of the tariff's lawfulness. Nor is that decision subject to judicial review. See Papago Tribal Utils. Auth. v. FCC, 628 F.2d 235, 240 (D.C. Cir.), cert. denied, 449 U.S. 1061 (1980). Consequently, no record of the basis of that decision for judicial review is required.

As the Commission observed in 1987, the Communications Act provides a separate, more formal, procedure for obtaining a Commission determination of a tariff's lawfulness. Any affected party may file a complaint under Section 208 alleging the unlawfulness of a tariff, and may thereafter seek judicial review if it wishes to challenge the Commission's ultimate determination. Imposing procedural restrictions on the pre-complaint tariff review process as well would therefore be both "premature and unnecessary." 1987 Order, 2 FCC Rcd. at 3017.

Most importantly, such restrictions would "unwisely encumber a process Congress specifically meant to be flexible and expeditious." Id. The purpose of communications between a carrier and the Commission staff during the tariff review process is to enable the carrier to respond to questions from the staff and to provide the staff with information that the staff believes would be useful to it in reaching a determination. This process is of value to both the carrier and the Commission. The Commission's initial determination whether to reject or suspend must be made in a highly compressed period of time, and tariff filings and the data underlying them are often detailed and complex. In many instances with AT&T's competitive offerings, time is of the essence. In this

context, free-flowing communications between a carrier and the Commission staff to discuss and clarify tariff filings thus serve the public interest by enabling the staff to discharge its responsibilities as efficiently as possible.

By contrast, unduly formalizing that process by requiring that each such contact be summarized and placed on the record would serve no discernable public interest, but would merely inhibit communication and delay decisionmaking. Carriers might be more reluctant to contact the Commission, might regulate such communications more rigorously on an internal basis (for example, by requiring that a carrier employee clear any such communication first with his or her superior), and might be more reluctant to share proprietary data with Commission staff.

Furthermore, subjecting tariff proceedings to a "permit but disclose" rule whenever such proceedings are contested would likely cause a dramatic increase in the number of contested, but meritless, tariff review proceedings. In 1994, AT&T tariffs were the subject of dozens of petitions to reject, suspend, or investigate, and all but 2 of those petitions were denied by the Commission. Because a "permit but disclose" rule would grant a carrier additional access to information about a competitor's offerings whenever the carrier intervenes in

the tariff proceeding, it would create a perverse incentive for carriers to intervene regardless of the merits. This would further impede the speedy processing of tariffs.

For all these reasons, the Commission should continue to exempt tariff review proceedings prior to investigation or a hearing from ex parte restrictions. To do otherwise would "unnecessarily restrict the staff's ability to make the necessary decisions . . . within the statutorily prescribed deadlines" and "unnecessarily complicate what was intended to be a rather straightforward procedure." 1987 Order, 2 FCC Rcd. at 3017.

### III. THE COMMISSION SHOULD NOT REQUIRE GREATER DETAIL IN SUMMARIES PREPARED IN PERMIT BUT DISCLOSE PROCEEDINGS.

Finally, the Commission also proposes that summaries prepared in permit but disclose proceedings, such as informal rulemakings, be more detailed. Notice, ¶¶ 44-45. Under the current rules, a party need not summarize those portions of a presentation that are not new -- i.e., those that describe data or arguments that have already been reflected in that party's prior written submissions in the same proceeding. See 47 C.F.R. § 1.1206(a)(2). The new rules, in contrast, would require

summaries of the entire content of the presentation, including those portions that are not new. Notice, ¶¶ 44-45.

This requirement is unnecessary and therefore unduly burdensome. There is no indication that any parties in Commission proceedings have been dissatisfied by summaries that do not reiterate arguments and data that another party had already placed on the public record. Nor would there be any cause for such dissatisfaction; when the arguments and data have previously been placed on the public record, interested parties have already been informed of those arguments and data and the record is sufficient to enable meaningful judicial review.

If, in contrast, parties file inadequate summaries of presentations that do contain new arguments or data, then such parties would simply be failing to comply with the Commission's current rules. That is a problem that cannot be addressed by adding a new rule. The proposed new rule will simply make the process of communicating with the Commission more cumbersome with no public benefit.

CONCLUSION

The Commission should not adopt the proposed ex parte rules, but should continue the current practice, in three respects: (1) Ex parte contacts should continue to be prohibited in Section 208 complaint proceedings; (2) tariff proceedings should continue to be exempt from ex parte rules unless and until those proceedings are designated for investigation or a hearing; and (3) the rules governing the content of the summaries of oral ex parte communications should not be modified. In each of those cases, the current rules reasonably balance the interests of fair process, efficient decisionmaking, and appropriate disclosure, and should therefore be maintained without change.

Respectfully submitted,

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